

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 March 2006

BALCA Case No.: 2005-INA-00037
ETA Case No.: P2004-CA-09535081/JA

In the Matter of:

DEL REY PLASTERING, INC.,
Employer,

on behalf of

DANIEL NAVARRO,
Alien.

Appearance: Ruben R. Gomez, *Director*
International Legal Services
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**¹
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Del Rey Plastering, Inc., (Employer) filed an application for labor certification² on behalf of Daniel Navarro on April 5, 2001 (AF 20).³ Employer seeks to employ

¹ Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

² Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the

Alien as a Plasterer (Occ. Code: 47-2161). *Id.* This decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, Employer described the duties of the position as follows:

Applies weatherproof, decorative coverings of stucco and plaster on exteriors of residential and commercial properties according to blueprints, architectural drawings, or oral instructions using hand and power tools. Erects scaffolds. Nails wire mesh, lath, and similar materials to outside surfaces to serve as binding device to hold stucco in place. Install guide wires on surface to indicate thickness of stucco to be applied. Spreads or sprays plaster over lath or masonry base, using spray gun or trowel and smoothes with darby and float to attain uniform thickness. Applies scratch, brown and/or finish coats of plaster successively as required. Roughens undercoat with scratcher to provide bond for succeeding coats. Creates decorative textures such as Float Finish, Light Spanish Texture, Machine Dash & Smooth Finish. Uses the EIFS technique or Exterior Insulation Foam System that involves the use of foam and/or dry ice. Decorates final or finish coat by marking with sand, brush, trowel, or by spattering with small stones.

(AF 20). Employer required two years' experience in the job offered. (AF 20).

In the Notice of Findings (NOF) issued February 27, 2004, the CO found that three U.S. applicants were unlawfully rejected. The CO found specifically that Employer rejected U.S. Applicant Soledad, who is considered qualified based on his resume. The CO noted that U.S. Applicant Soledad was rejected because he did not normally work from blueprints or drawings and because, although he had done work with foam around windows and walls, he was not specifically familiar with EIFS. The CO questioned the need to read blueprints for the plastering

Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

³ In this decision, AF is an abbreviation for Appeal File.

work and noted that the job description also provided for a plasterer to use blueprints, architectural drawings, or oral instructions. The CO also found that the requirement of experience with a specific brand of insulation foam was not listed as a special requirement, which would allow the local office the opportunity to advise Employer that such a specific requirement appeared restrictive.

The CO found that Employer's requirement for U.S. Applicant Vaughn to bring references at the time of the interview was restrictive. U.S. Applicant Vaughn had worked for a company that was out of business, and thus he could not bring "proof" of experience to the job interview. U.S. Applicant Vaughn had references from independent "moonlighting jobs," and Employer advised him that if his references "amounted to 2 years of experience, they would be considered at the time of the interview." The CO stated that Employer could have checked out the references after the interview. The CO found that it was restrictive to require the applicant to provide documents verifying his previous employment at the time of his interview.

Finally, the CO noted that U.S. Applicant Mack was rejected because Employer's letter to him was returned as undeliverable. The CO found that this constituted insufficient effort to contact him since there is no evidence as to whether this was a postal service error, a problem with mail receipt at the address, or a mistaken address number. Therefore, the CO stated that Employer should have made additional attempts to contact him. The CO noted that U.S. Applicant Mack's resume showed nine years of painter experience that included stucco work, making him likely qualified.

The CO stated that Employer could submit documentation on rebuttal which would persuasively establish how the U.S. workers named above were recruited in good faith during the recruitment period and rejected solely for lawful, job-related reasons.

Employer submitted rebuttal on March 22, 2004 (AF 6-14). In a letter dated March 16, 2004, David Ekblad, President, addressed each of the U.S. applicants individually. Employer

stated that U.S. Applicant Soledad did not possess experience for two years as a plasterer. His resume indicated, and he confirmed on the telephone, that his experience was in plaster patching and repairing plaster damages. U.S. Applicant Soledad did not have experience in reading blue prints, a job duty that is included in the definition of Plasterer in the Dictionary of Occupational Titles. In addition, Employer clarified that EIFS or Exterior Insulation Foam System is not a specific brand of insulation, but a method of applying plaster quite common to residential and commercial construction. Employer stated further that anyone with two years of experience in construction plastering (not just patching stucco) would have experience and be aware of this method. Thus, Employer stated that this requirement was not intended to “discourage” the applicant as implied.

Employer stated that he did not discourage U.S. Applicant Vaughn from pursuing his application. Rather, since U.S. Applicant Vaughn’s experience was with an out-of-business company, Employer offered him the opportunity to demonstrate his two years’ experience as a Plasterer by allowing him to provide personal references from moonlighting jobs *other* than the official employer referenced in his resume. Employer stated that this applicant’s failure to appear for the scheduled interview indicates he was not willing to fill the position.

Finally, Employer stated that he attempted to contact U.S. Applicant Mack by telephone, but he got no answer and the phone did not have an answering machine. Employer then sent a certified letter, which was returned. Employer also argued that this applicant’s resume did not establish that he was qualified since his nine years of experience included work as a painter, sheet rock installer, home “remolder,” and forklift operator in addition to “stucco.” Therefore, Employer concluded that this applicant is unqualified and unavailable. (AF 6-14).

The CO issued a Final Determination denying Employer’s application for labor certification on April 2, 2004. (AF 4-5). The CO found that Employer’s rebuttal failed to respond to the deficiencies noted in the NOF. Specifically, the CO found that Employer has not documented that he was willing to interview U.S. Applicant Vaughn if he did not bring proof of

two years' experience to the interview. The CO stated that since the company for which he had worked was out of business, Employer could have verified his experience. Employer's requirement that this particular U.S. applicant bring proof of experience to the interview, therefore, likely discouraged the U.S. applicant from pursuing the job offer.

The CO found that Employer did not document alternative contacts to U.S. Applicant Mack, whose certified letter was returned. Specifically, Employer stated in rebuttal that he had attempted to contact all applicants by telephone, and his notes for U.S. Applicant Mack provide that there was no answer and no answering machine. However, the CO found that Employer's statement was not sufficient documentation of his other attempts at contacting U.S. Applicant Mack. The CO also noted Employer's objections to this applicant because his resume did not clearly state that he had two years of experience in stucco work, however, the CO stated that further information would have been necessary before determining that he did not have the equivalent of two years of experience as a plasterer.

Finally, the CO acknowledged Employer's clarification of the acronym used in the recruitment report regarding the Exterior Insulation Foam System utilized in the job. Although the CO agreed that reading blueprints is included in the DOT job description, the CO stated, "nevertheless, where this applicant has the required amount of experience as a plasterer, we are not persuaded that he cannot use blueprints to the extent required even if he has not previously worked from blueprints. We find that he is qualified because his resume shows more than two years experience as a plasterer."

On April 16, 2004, Employer requested review before the Board of Alien Labor Certification (Board). (AF 1). Employer argued, in regards to U.S. Applicant Vaughn, that the CO did not explain why he is not allowed to expect an applicant to demonstrate proof of the required minimum experience for the position. Employer argued, in regards to U.S. Applicant Mack, that the original telephone attempts were not documented because he was not reached. A copy of the letter and a copy of the returned envelope, however, were submitted with the recruitment report. In addition, Employer argued that the applicant's resume showed on its face

that he did not meet the minimum requirements. Therefore, Employer concluded that this applicant, who was unavailable and who did not have the required experience, was not a viable candidate for the job. Finally, Employer argued again that U.S. Applicant Soledad's experience in plaster repair does not make him qualified. Employer noted that he did not have two years' experience as a plasterer, and the description on his resume of the work he performed is clearly different from the description for this job opportunity. (AF 1-3).

The case was docketed by the Board on November 29, 2004.

DISCUSSION

After reviewing the resume for U.S. Applicant Soledad and Employer's arguments that he did not have the required experience for this job opportunity, we are persuaded by Employer's arguments. Where an employer's job requirements are not found to be unduly restrictive, a U.S. applicant who does not meet all of the stated job requirements is not qualified for the position, and may be lawfully rejected. *Euclid Chemical Co.*, 1988-INA-398 (May 4, 1989) (*en banc*). Employer correctly argues that U.S. Applicant Soledad's experience was not in the job duties listed for the job opportunity as plasterer, but rather, was in the areas of plaster and stucco repair. Since U.S. Applicant Soledad's resume did not indicate experience in the job duties as a plasterer and since the CO has not explained why this applicant with experience in plaster repair has the experience for plaster and stucco construction, we find Employer has established that U.S. Applicant Soledad, who was rejected for lack of the required experience, was rejected for lawful job-related reasons.

We disagree with Employer, however, that he has demonstrated good faith recruitment in his manner of contact of U.S. Applicant Mack. The copy of the returned certified letter sent to the correct address on Mr. Mack's resume demonstrates Employer's attempt to contact the applicant. We agree with the CO, however, that Employer should have documented with particularity his attempted telephone calls to U.S. Applicant Mack on rebuttal. *See Yaron Development Co., Inc.*, 1989-INA-173 (Apr. 19, 1991) (*en banc*). In addition, we find labor certification was properly denied since Employer did not provide any documentation of any

attempts to contact this applicant by telephone following the return of the undelivered contact letter. *See Divinia M. Encina*, 1993-INA-220 (Jun. 15, 1994). We conclude that Employer has not established good faith recruitment of U.S. Applicant Mack, and therefore, that Employer has not established a lawful job-related reason for rejecting him for the job opportunity.

Employer argues that U.S. Applicant Mack may not be qualified since he may not have two years of experience in the job offered, because his resume indicates that he performed several other jobs during his employment from 1991 through 1999 in addition to stucco work. That determination, however, would be properly made in an interview that explored further his experience in the prior job. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*).

We also disagree with Employer that he demonstrated good faith recruitment in his contact with U.S. Applicant Vaughn. A review of Mr. Vaughn's resume indicates four years' experience as a plasterer. Mr. Vaughn referenced experience with the EIFS system noted in Employer's job description. When U.S. Applicant Vaughn responded to Employer's certified letter to set up an interview, however, Employer told him he would need to bring proof of a minimum of two years' experience to the job interview. Employer reported that Mr. Vaughn stated that the company he had worked for no longer existed and he could not bring such proof. The applicant was then informed he could bring references from moonlighting jobs and if they amounted to two years of experience, he would be considered at the time of the interview. (AF 24).

In its contact with the applicant, an employer should not discourage the applicant. *Noh Mask and Unfolding Futon*, 1989-INA-144 (Feb. 7, 1990). In that regard, we have found labor certification was properly denied when an employer discouraged an applicant who supplied the employer with extensive information indicating that the individual may be qualified for the position, yet the employer requested additional information rather than calling the applicant in

for interview. In that case we found, “it behooves such employer to interview the applicant...requiring an extra screening step will be given strict scrutiny because of its chilling effect on U.S. applicants interested in the position.” *Therapy Connection*, 1993-INA-129 (Jun. 30, 1994). Similarly, as in the instant matter, where the U.S. applicant provided a resume with information indicating that he may be qualified for the position, Employer’s statements to him on the phone that *if* his references from moonlighting jobs amounted to two years’ experience, he would be considered at the time of the interview could have a chilling effect on the U.S. applicant interested in this position. Therefore, we find that Employer has not established a good faith effort to recruit U.S. Applicant Vaughn and, accordingly, has not established a lawful job-related reason for rejecting this U.S. applicant.

Since Employer has not demonstrated lawful job-related reasons for rejecting the U.S. Applicants Mack and Vaughn, we conclude that the CO properly denied the application for labor certification.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.